Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PETER TERRITO AND STEVEN KENNEDY, AND AMERICAN MOTORISTS INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY, AND LONDON MARKET INSURERS (as the insurers for the liability of James O'Donnell (deceased), Steven Kennedy, John Chantrey (deceased), and Peter Territo),

Petitioners,

v.

ALFRED ADAMS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Longshore and Harbor Workers' Compensation Act ("LHWCA") and the Supremacy Clause of the United States Constitution preempt the application of state tort law by precluding a damages claim brought by a shipworker covered by the LWHCA against his co-employees, where damages claims against co-workers are expressly disallowed by the LHWCA.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE

The Petitioners in this case are Peter Territo and Steven Kennedy, and American Motorists Insurance Company, Commercial Union Insurance Company, Highlands Insurance Company, The Travelers Indemnity Company and London Market Insurers (as the insurers for the liability of James O'Donnell (deceased), John Chantrey (deceased), Steven Kennedy, and Peter Territo). The Respondents in this case are 67 individuals:

Alfred Adams
Leslie D. Anderson
Lester C. Badeaux
Leroy L. Bonamour
William E. Boudreaux
Claude J. Brunet
John Byrd
Robert W. Campbell, Jr.
Junior J. Chaisson
Oscar J. Champagne
Patrick Clark
James A. Clement
Richard J. Cologne, Jr.
Walter Cologne
Charles P. Custard
Raymond A. Dantin
Bobby Davis, Sr.
Adam M. Decota
James W. Deshotel
George T. Disher
Riley D. Dufrene
Eugene Edwards
Joseph Faulk
Earlven Gauthe
Benny J. Giovingo
Floyd D. Glass
Stanley A. Gomez
Alvin Gonzales
Earl J. Guidry
Anthony Hebert
Joseph Hensley
Maxwell J. Hinrichs
James Houston, Jr.
Lewis T. Ishee
Kermit J. Kraemer, Jr.
Woodward Laird
Larry L. Landry, Sr.
Eric P. LeBlanc
Hyson M. LeBlanc
William Lombas, Jr.
James H. Magee
Randy E. Martinez
Lindsey J. Mazarac, Sr.
Walter B. Mitchell
Lovette D. Mize
Clarence J. Mollo
Robert C. Murphy
Maurice J. Ockmond, Jr.
Kirby Ordoyne
Angel Palenzuela

John R. Parker
Sam A. Pravata, Sr.
Kenneth G. Prestenbach
Roger H. Quave
James E. Reech
Alvin Robin
Alvin G. Robin
Andrew J. Stauder
Gary J. Stevens
Wallace Stevens
Glen R. Sticker
Oda K. Tate, Jr.
Stanley J. Thibodeaux
Robert L. Thomas, Sr.
Cleveland J. Thompson, Jr.
James J. Wainwright
Winston M. Whitten, Sr.

Other parties to this case are the heirs of Patrick Clark and Earlven Gauthe, who are: Deanna Clark, Wanda C. Crawford, and Bradley Michelli (for Clark), and Dorothy Gauthe, Paul Gauthe, Helen Cantrelle, Marion Fleming, and Anne Richwine (for Gauthe).

As required by Rule 29.6, the following corporate disclosures are made:

1. American Motorists Insurance Company:

   American Motorists Insurance Company is a 100%-owned subsidiary of Lumbermens Mutual Casualty Company, the parent company in the Kemper Insurance Companies. Lumbermens Mutual Casualty Company is owned by its policyholders. It does not have any stockholders.

2. Commercial Union Insurance Company:

   Commercial Union Insurance Company changed its name to One Beacon America Insurance Company. White Mountain Insurance Group, LTD, owns 10% or more of the corporation's stock.

3. Highlands Insurance Company:

Highlands Insurance Company is a wholly-owned subsidiary of Highlands Holding Company, Inc., which is owned by the Highlands Insurance Group, Inc. Highlands Insurance Group, Inc. is a publicly-traded corporation, but no publicly-held company owns 10% or more of its stock.

4. The Travelers Indemnity Company:

The Travelers Indemnity Company is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Insurance Group Inc., which is an indirect wholly-owned subsidiary of Citigroup, Inc., a publicly traded company. No publicly-held company owns 10% or more of the company's stock.

5. London Market Insurers:

The London Market insurance companies that subscribed to policies that are implicated by this litigation are:

Agrippina Versicherungs Aktiengesellschaft
British Traders Insurance Company Limited
Economic Insurance Company Limited
Excess Insurance Company Limited
Cornhill Insurance Company Limited
Insurance Company of North America
Liverpool Marine & General Insurance Company
London & Edinburgh Insurance Company Limited
Northern Maritime Insurance Company Limited
River Thames Insurance Company Limited

Sphere Drake
The Edinburgh Assurance Company
The Northern Maritime Insurance Company Limited
The Scottish Lion Insurance Company Limited
Threadneedle Insurance Company Limited
World Auxiliary Insurance Corporation Limited

No publicly-held company owns 10% or more of the London Market insurance companies whose policies are implicated by this litigation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, comprised of several employees of a shipyard and their insurers, were held liable at trial on state law claims of negligence arising out of plaintiffs' exposure to asbestos at their workplace. Petitioners unsuccessfully argued to the trial court that the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act") preempted the plaintiffs' state law claims, due to an inconsistency between the LHWCA and the state law with respect to the availability of suit against co-workers for injuries longshore or harbor workers sustained on the job. The Louisiana Fifth Circuit Court of Appeal affirmed the judgment in favor of plaintiffs, explaining that an earlier Louisiana Supreme Court decision, *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), *appeal dismissed for want of jurisdiction, Territo v. Poche*, 434 U.S. 803 (1977) bound it to hold that the LHWCA does not preempt such state law tort claims, despite the inconsistencies between the LHWCA and state law.

The Louisiana Supreme Court denied review in this case, notwithstanding the fact that the court of appeal's decision produced a direct conflict with the Alabama Supreme Court and the United States Courts of Appeals for the Fifth and Third Circuits on this issue of federal law, and is inconsistent with decisions issued by this Court both prior to and after *Poche*. Petitioners hereby petition for a writ of certiorari to the Louisiana Supreme Court to ensure a uniform application of this important federal law.

OPINIONS BELOW

The 71 workers covered by the LHWCA and subject to this Petition brought consolidated asbestos personal-injury

claims against the Petitioners. A jury rendered a verdict in favor of all of the Respondents. The trial court denied Petitioners' Motion for Directed Verdict and Alternative Motion for Judgment Notwithstanding the Verdict. Due to the complexity of the proceedings on appeal, the Louisiana Fifth Circuit Court of Appeal rendered a separate opinion on issues common to all plaintiffs, including the issue whether the LHWCA barred the state law claims against these Petitioners. The court of appeal affirmed the judgment.

The order of the trial court denying Petitioners' Motion for Directed Verdict and Alternative Motion for Judgment Notwithstanding the Verdict is unreported. [App. 160, 168.] The common issues opinion is reported at 784 So. 2d 46 (La. App. 5th Cir. 3/28/2001). [App. 1.] Separate opinions were rendered by the court of appeal in each case awarding damages.[1] The appellate court denied Applicants' Motion for Rehearing on the common issues opinion on April 26, 2001. [App. 186.] Petitioners filed timely petitions for writs of certiorari to the Louisiana Supreme Court with respect to all of the opinions involving all Respondents in this Petition, claiming error in the interpretation of the LHWCA, among other errors. The Louisiana Supreme Court's orders denying the Petitioners' petitions for writs of certiorari are not reported. [App. 150.] The unofficial citations for the denials are at: 2001-C-1534; 2001-C-1543; 2001-C-1544; 2001-C-1629; 2001-C-1853 (La. 12/14/01).

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[1] The appellate courts' "common issues" opinion also includes individual judgments for seven plaintiffs. The other separate opinions are not attached in the Appendix to this Petition, because they are concerned only with quantum.

JURISDICTION

The orders of the Louisiana Supreme Court denying Petitioners' petitions for writs of certiorari in the subject cases were entered on December 14, 2001. [App. 150.] No petition for rehearing is allowed under state law. Thus, the orders are final. This Court's jurisdiction rests on 28 U.S.C. § 1257(a), because the highest court of Louisiana applied its own state law and interpreted a federal statute in a manner that invalidates Petitioners' rights under that federal statute and violates the Supremacy Clause of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, clause 2 provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. Art. VI, cl. 2.

The federal statute involved in this case is the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, specifically 33 U.S.C. § 933(i). That provision, entitled "Right to Compensation as Exclusive Remedy," provides:

> The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any person or persons in

the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

The entirety of section 933 is duplicated in the Appendix to this Petition. [App. 189.]

Also involved in the case are state statutes: Louisiana Revised Statutes §§ 23:1032 (as it existed before the 1976 amendments) and 23:1035.2. These statutes are reproduced in the Appendix as well. [App. 194 and 197.]

STATEMENT OF THE CASE

This case involves the interaction of two statutory schemes – the LHWCA and the worker's compensation laws of the state of Louisiana – in the context of multi-party tort litigation brought by shipyard workers exposed to asbestos on the job.

A. The Competing Federal And State Compensation Statutes.

Congress originally enacted the LHWCA in 1927, codifying a compromise between labor and industry. On the one hand, covered "longshoremen" would be guaranteed certain compensation benefits for injuries sustained in their employment (including injuries arising from asbestos exposure). On the other, the longshoremen's employers received immunity from tort suits. 33 U.S.C. § 905(a). In 1959, Congress extended the tort immunity to cover co-workers of aggrieved longshore and harbor workers. 33 U.S.C. § 933(i). That provision, entitled "Right to Compensation as Exclusive Remedy," provides:

The right to compensation or benefits under this chapter shall be the exclusive remedy to an

> employee when he is injured, or his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

33 U.S.C.A. § 933(i) (West 2001). [App. 193.] The purpose of this amendment was to guarantee an employee the right to compensation if he is injured, while at the same time guaranteeing each employee protection from damages lawsuits should an employee negligently injure a co-worker. S. REP. NO. 86-428, at p. 2 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2134, 2135 (the "legislative history"). [App. 198, 201.]

Parallel to this federal statutory regime, Louisiana provides certain compensation rights and immunities to workers in its state, including workers covered by the LHWCA. Prior to 1976, Louisiana's workers' compensation statute enabled workers to receive guaranteed compensation in lieu of tort judgments from their employers for injuries occurring on the job, but a lapse in wording permitted injured workers to sue fellow workers in tort for damages for these same injuries even while receiving the guaranteed compensation under state law. In 1976, the Louisiana legislature closed that loophole by making co-workers, in addition to employers, expressly immune from such tort suits. Although co-workers prospectively gained some measure of protection by the amendment to the state compensation scheme, the Louisiana Supreme Court held that the amended statute did not apply to negligence claims against co-workers that accrued prior to 1976. *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976).

Applying this reasoning, Louisiana courts allow tort claims against co-workers alleging pre-1976 asbestos exposure. [App. 15-21.]

B. The Plaintiffs' Lawsuit.

Eight years ago, the 71 workers named Respondents to this Petition sued, among others, six of their co-workers for asbestos-related personal injuries allegedly incurred on the job. The Respondents represented virtually every craft necessary in ship construction at Avondale Shipyards, a shipbuilding company located on the banks of the Mississippi River near New Orleans. The defendants included James O'Donnell, Steven Kennedy, and John Chantrey, three former directors of the Avondale safety department, and Peter Territo, an employee who worked in the Avondale safety department (the "co-worker defendants"), and their insurers (collectively, "Petitioners"). It is undisputed in this case that the plaintiffs and the co-worker defendants are "employees" protected by the LHWCA.[2]

All of the plaintiffs asserted negligence causes of actions against the co-worker defendants. Petitioners repeatedly argued to the trial court that the LHWCA preempted the plaintiffs' ability to assert state law negligence claims against them, as it expressly prohibited such claims against a covered employee's co-workers. Before trial, Petitioners filed separate exceptions of no cause of action based on the

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[2] In latent-disease cases where injury is alleged to be caused by exposure to asbestos, the applicable law under the LHWCA is that in effect at the time the injury manifests, and not that in effect at the time of the asbestos exposure. *Castorina v. Lykes Brothers S.S. Co., Inc.*, 758 F.2d 1025 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985). In this case, plaintiffs' injuries manifested in 1993 or later, and the LHWCA as of that date unquestionably covered all employee plaintiffs and defendants.

LHWCA or raised the co-employees' LHWCA immunity as an affirmative defense.[3] After trial, the Petitioners jointly filed a Motion for Directed Verdict and Alternative Motion for Judgment Notwithstanding the Verdict based upon the LHWCA and again raised the co-employees' LHWCA immunity as affirmative defenses.[4] The trial court denied the exceptions and motions. Specifically, the trial court's December 9, 1996 final judgment states: "The motion for judgment notwithstanding the verdict regarding the Longshore and Harbor Workers [sic] Compensation Act barring plaintiffs' claims filed by the executive officers of Avondale Shipyards and their insurers is DENIED." Record at p. S279. [App. 168.]

C. State Appellate Proceedings.

Petitioners suspensively appealed the judgments in the 67 cases subject to this Petition.[5] The appeals were consolidated and, pursuant to the appellate court's briefing order, issues common to all appeals were briefed separately as "common issues" in the initial brief submitted to the court. One of the common issues was "whether the plaintiffs' claims against the executive officer defendants are barred by the provisions of the Longshore and Harbor Workers'

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[3] *See, i.e.*, Record at pp. 435-42 (American Motorist's Exception), 561 (Highland's Exceptions), 871-74 (American Motorists' Answer and Affirmative Defenses), 960-65 (London Market Insurers' Answer and Affirmative Defenses), 1038-55 (Travelers' Exceptions, Answer, and Affirmative Defenses), 1065-82 (Commercial Union's Exceptions, Answer and Affirmative Defenses), and 1348-54 (American Motorists' Amended Exceptions).

[4] Record at pp. 6982-7009.

[5] Petitioners appealed from 72 of the consolidated cases. The judgment in the *Felix Albert* case is not included in this Petition because Mr. Albert was not an Avondale employee. Likewise, Petitioners did not ask for a review of four of the other individual appeals, in which the appellate court reversed the findings of liability.

Compensation Act." [App. 22.] Petitioners contended that the LHWCA conflicted with state tort law, because the LHWCA expressly precludes suits against co-employees such as Petitioners, whereas the workers' compensation law in Louisiana prior to 1976 (during which time the plaintiffs were exposed to asbestos at Avondale) permitted them. In light of this conflict, Petitioners argued, federal law must prevail.

On March 28, 2001, a *per curiam* opinion was rendered on the common issues. [App. 1.] The appellate court held that the LHWCA did not bar the plaintiffs' state law claims against Petitioners. The court found controlling *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), in which the Louisiana Supreme Court had held that the estate of a shipworker killed on land could assert a wrongful death claim under the state's tort law against the employer and certain co-workers. The *Poche* court reasoned that the LHWCA supplemented state workers' compensation laws, and therefore did not supplant tort remedies otherwise available to the shipworker's estate under state law. Following *Poche*, the appellate court in this case affirmed the judgment against Petitioners, finding that the plaintiffs were entitled to elect whether to pursue remedies under the LHWCA or state workers' compensation law. The court stated that because these plaintiffs did not elect to proceed under the federal LHWCA, each could "avail himself of the entire body of state compensation law, not merely the portions that do not conflict with the federal scheme." *Abadie*, 784 So. 2d 46, 67. [App. 26.] According to the reasoning of the appellate court, following *Poche*, the "body of state compensation law" included freestanding tort rights that were not precluded by state workers' compensation law.

A motion for reconsideration of the "common issues" opinion was filed on April 11, 2001, and denied on April 26, 2001. On May 25, May 29, June 6, and July 2, 2001, Petitioners filed petitions for writs of certiorari, claiming error, among other things, in the appellate court's interpretation of the LHWCA so as to permit tort suits against Petitioners. On December 14, 2001, the Louisiana Supreme Court denied Petitioners' petitions for writs of certiorari. [App. 150.] As a result of this decision, at the sole option of the plaintiff, state law overrides and negates otherwise applicable federally granted statutory immunity.

REASONS FOR GRANTING THE WRIT

The cornerstone of the appellate court's interpretation of the LHWCA in this case was the Louisiana Supreme Court's 1976 decision in *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976). If the Louisiana Fifth Circuit Court of Appeal's judgment stands (as the Louisiana Supreme Court has allowed by denying Petitioners' writ petitions), injured longshore and harbor workers in Louisiana may continue to sue their fellow workers in tort despite the absolute immunity conferred upon such fellow workers by the United States Congress.

The holding of *Poche*, as reiterated by the Louisiana Fifth Circuit Court of Appeal in these consolidated cases, stands in direct conflict with decisions of other state supreme courts and federal courts of appeals. Intervention by this Court is necessary to ensure uniform application of this important federal statute and to vindicate the federally granted rights of thousands of maritime workers. Further, it is essential to bring the law in Louisiana into conformity with this Court's preemption jurisprudence.

I. The Louisiana Supreme Court's Decision Directly Conflicts With Decisions of the Alabama Supreme Court and the United States Courts of Appeals For the Third and Fifth Circuits.

The Alabama Supreme Court, in *Fillinger v. Foster*, 448 So.2d 321 (Ala.), *cert. denied,* 469 U.S. 872 (1984), properly held that because the LHWCA and the laws of Alabama conflicted on the issue of co-worker immunity, the federal LHWCA preempted the state law. Thus, on facts virtually identical to the facts in this case, the Alabama Supreme Court honored the federal immunity, and the suit against the Alabama co-employee under state law was dismissed. The Alabama decision correctly resolved the identical conflict between federal and state law that is presented in this case, and protected Alabama shipyard workers from tort liability, as required by federal law. Shipyard workers in the nearby state of Louisiana, however, are denied this federal benefit as a result of *Poche* and the decision below.

In *Fillinger*, a "shipfitter" was injured within the concurrent jurisdiction of the LHWCA and the Alabama State Workers' Compensation Act. As here, the plaintiff in *Fillinger* did not apply for LHWCA benefits. Rather, after applying for his state compensation benefits, the plaintiff brought suit against one of his co-employees who was alleged to have had specific responsibility for his safety. Like the Louisiana law at issue in this case, the Alabama Workers' Compensation Act did not immunize co-employees from liability in tort suits. The co-employee defendant argued that § 933(i) of the LHWCA barred the state tort claims, but the plaintiff responded, citing *Poche*, that state law remedies existed as concurrent to the LHWCA and could

be elected. The Alabama Supreme Court ruled in favor of the co-worker defendant and expressly rejected the holding of *Poche*. It held, in contrast, that that "the concurrent jurisdiction for pursuit of benefits under a state's workmen's compensation scheme does not include common law suits for damages against co-employees." *Fillinger*, 448 So.2d at 326. Where the LHWCA and the state law are in "serious conflict," as in *Fillinger* and in *Poche* with respect to the maintenance of co-employee suits, the LHWCA preempts the state law. *Id.*

The decision below likewise directly conflicts with a decision of the United States Court of Appeals for the Fifth Circuit, which specifically held that the LHWCA preempted state law on the question of whether individuals subject to the LHWCA could bring tort actions against their co-employees. *Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993). In *Perron*, a worker on an offshore platform slipped and fell, allegedly due to oil negligently left on the platform by a co-worker. *Id.* at 1410. Perron sued the nominal employer of his co-worker on a theory of *respondeat superior*, arguing that Louisiana law permitted such a tort claim. Holding that Section 933(i) preempted any claims that might be made under Louisiana tort law against co-employees, *id.* at 1411-12, the court dismissed the *respondeat superior* suit.

A hypothetical illustrates how the direct conflict between the decision below and the *Perron* case could produce inconsistent results with respect to the very same underlying injury. Assume that a longshore worker is injured on a job site in Louisiana as a result of the negligence of two co-workers. The injured worker then files a claim of

negligence in state court against co-worker A, who resides in Louisiana, and a diversity suit in federal court against co-worker B, who resides in the neighboring state of Texas. Under the decision below, the worker's claim could proceed in state court against co-worker A, but would be barred under *Perron* against co-worker B.

The decision below also conflicts with *Peter v. Hess Oil*, 903 F.2d 935 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991), in which the court applied the analogous employer-immunity provision of the LHWCA to preclude a state tort suit. In *Hess Oil*, a longshoreman sustained injury by inhaling noxious fumes. The plaintiff filed a state negligence claim against Hess Oil based on its alleged failure to provide him with a safe place to work. Although Hess Oil was found to be the plaintiff's "borrowing employer" under the LHWCA, the Virgin Islands' legislature had abrogated the "borrowed servant" doctrine as a matter of state law just one month before Peter began his employment at Hess Oil. As a result of that abrogation, Peter argued that he was entitled to maintain a state negligence action against Hess Oil.

The Third Circuit concluded that "'a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of [the Supreme] Court.'" *Hess Oil.*, 903 F.2d at 951, *quoting Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10 (1953). The court recognized that if it allowed the negligence action against Hess Oil, the court would deprive Hess Oil of a federally guaranteed right of immunity granted under Section 905(a) of the LHWCA (the immunity provision for employers that parallels Section 933(i)'s immunity for co-workers). After considering the opinions in *Poche* and *Fillinger*, the Third Circuit sided with the

reasoning in *Fillinger* and held that the state law allowing state tort actions against "borrowing employers" must be preempted pursuant to the Supremacy Clause of the Constitution. *Id.* at 953. The court wrote:

> [T]he legislative history of the 1972 amendments [to the LHWCA] does make clear that Congress was motivated by two relevant considerations. *First, Congress intended that compensation, not tort damages, were to be the primary source of relief for workplace injuries for longshoremen against their employers*. Second, Congress believed that the incentives for tort litigation created by [prior] case law had done little to aid maritime workers or the public interest.

Hess Oil, 903 F.2d at 952 (emphasis added). With that, the court held that permitting a tort suit to proceed against an employer who had obtained LHWCA coverage for his employees would "obstruct the purposes of LHWCA by depriving maritime employers of their side of the *quid pro quo* [*i.e.* immunity granted in exchange for guaranteed compensation]." *Id.* at 953.

Fillinger, Perron and *Hess Oil* are directly at odds with the Louisiana Supreme Court's ruling in *Poche* and its continued application in the subject cases. Thus, employees covered by the LHWCA working in Louisiana, if sued in state court, are denied federal statutory immunities from suit that are recognized in other jurisdictions and in federal courts within Louisiana.

II. The Louisiana Supreme Court's Decision Is Inconsistent With Decisions Of This Court

A. The Decision Below Is Inconsistent With This Court's Interpretation of the LHWCA.

This Court considered the relationship between the LHWCA and state compensation schemes in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, *reh'g denied*, 448 U.S. 916 (1980). The case involved five employees of a shipbuilding company covered under the LHWCA. The injured workers filed for and received benefits under state compensation acts. The shipbuilding company argued that the state compensation action should be dismissed, arguing that the LHWCA provided the exclusive remedy to the injured worker. Although *Sun Ship* involved compensation claims and did not involve either a tort claim or the immunity provisions in 33 U.S.C. § 933(i), the basis for this Court's decision is inconsistent with the Louisiana courts' disposition of this case.

The issue presented in *Sun Ship* was whether the LHWCA preempted all state workers' compensation schemes, even where there was nothing in the payment of state compensation that was inconsistent with the LHWCA. The Court held that, at least in the absence of such inconsistency, Congress had not indicated any intent to foreclose the availability of state workers' compensation programs if the injured worker elected to pursue those programs. *Id.* at 722. The Court found no inconsistency in permitting workers to elect a more generous state workers' compensation remedy, explaining that Congress did not, in the LHWCA, provide employers with any rights that would

be obstructed if the injured workers elected to receive state compensation. *Id.* at 724-25.

Importantly for this case, the Supreme Court expressly noted in *Sun Ship* that it was not addressing cases where the state law compensation scheme operated to deny rights that were guaranteed by the LHWCA. Forecasting a possible case where application of an exclusivity clause in a state workers' compensation statute would foreclose the ability of an injured worker to receive the minimum guaranteed payments pursuant to the LHWCA, the Supreme Court suggested the appropriate remedy would be to preempt whatever portions of the state compensation scheme produced the conflict. *Id.* at 724 & n. 6. The immunity provided to co-workers in the LHWCA is no less a guarantee of the Act than are the minimum payments guaranteed to injured workers as discussed in *Sun Ship*, as was recognized by the court in *Fillinger v. Foster*, 448 So.2d 321, 325 (Ala. 1984). The decision below, by contrast, does violence to the foundation on which *Sun Ship* was decided.

B. The Decision Below Also Is Inconsistent With Numerous Other Decisions Of This Court Involving Standard Principles of Preemption.

The Court of Appeal's decision in this case rejects the approach in numerous cases decided by this Court, which illustrates that preemption should apply here. For instance, in *Livadas v. Bradshaw*, 512 U.S. 107 (1994), the plaintiff complained that the State Commissioner of Labor's interpretation and application of various state laws denied the plaintiff her rights under the Federal National Labor Relations Act. Significantly, this Court held that the Commissioner's policy, which required the plaintiff to chose

between her rights under the state law or under the federal law, could not be reconciled with the federal statutory scheme premised on the centrality of the right to bargain collectively and the desirability of resolving contract disputes through arbitration. 512 U.S. at 115-17. As in *Livadas*, this case involves a state policy that has a "'direct tendency to frustrate the purpose of Congress' and, if not pre-empted, would 'defeat or handicap a valid national objective,'" and requires intervention by this Court. *See Livadas*, 512 U.S. at 116-117, *quoting Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 239 (1967).

"Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Felder v. Casey*, 487 U.S. 131, 138 (1988), *quoting Free v. Bland*, 369 U.S. 663, 666 (1962). This Court in *Felder* held that "a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, . . . because the application of the state immunity law would thwart the congressional remedy, . . . which of course already provides certain immunities for state officials." *Felder*, 487 U.S. at 139, *quoting Martinez v. California*, 444 U.S. 277, 284 (1980). Thus, *Felder* presented an inconsistency between federal and state immunities precisely the opposite of that presented here. Applying the same preemption principles here, a federal law's immunity provision must prevail over a contrary state law. In other words, the application of Louisiana tort law, as applied by the Louisiana Supreme Court in *Poche* and in the decision below to allow LHWCA workers to sue co-workers in tort, must yield to the

LHWCA's grant of immunity to the co-workers, which directly conflicts with the state law result.

In another case addressing preemption, this Court overrode state law to enforce a federally granted immunity in *Howard v. Lyons*, 360 U.S. 593 (1959). The defendant in *Howard* was a commanding officer of a Naval shipyard, who was sued under state law for defamation after disseminating information to members of Congress for the state in which the shipyard was located. Because the federal officer was acting in the course of his official duty, the communication was absolutely privileged under federal law, precluding the tort suit brought under state law. This Court upheld the validity of the claim of absolute privilege, noting that such a privilege was "designed to promote the effective functioning of the Federal Government. No subject could be one of more peculiarly federal concern, and it would deny the very considerations which give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several States." *Id.* at 597. Although "the effective functioning of the Federal Government" is not directly implicated by the immunity granted under the LHWCA, plainly the LHWCA immunity is one designed to promote the effective functioning of the federal compensation scheme for longshore and harbor workers.

Significantly, the court in *Hess Oil* applied the principles of preemption to find in favor of LHWCA preemption. *Hess Oil*, 903 F.2d 935, 953. Other maritime cases have also held that the LHWCA preempts inconsistent state law. In *Gates v. Shell Oil*, 812 F.2d 1509 (5th Cir. 1987), *cert. denied*, 494 U.S. 1017 (1990), a worker was injured on an oil platform covered by the Outer Continental Shelf Lands Act. Under federal law, Gates could sue Shell

Oil as a "third party." But under Louisiana law Shell Oil was a "statutory employer" and had a defense to the suit. The court found that because the LHWCA and Louisiana compensation law conflicted on the availability of affirmative defenses, the LHWCA prevailed. *Id.* at 1514. Applying the same reasoning, because the LHWCA and Louisiana compensation law concerning co-employee immunity conflict, the LHWCA again must prevail.

In *Poche*, the Louisiana Supreme Court circumvented the test for preemption as stated by this Court in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988). In that case, this Court noted that:

> . . . even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "'when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'"

Schneidewind, 485 U.S. at 300 (citations omitted). The requirements for preemption are met here, because it is impossible to comply with both the Louisiana law and the federal LHWCA, and Louisiana's law is an obstacle to the accomplishment of the full purposes and objectives of Congress in enacting section 933(i) of the LHWCA, as expressed in the legislative history. [App. 198.] Louisiana's preemption analysis produces an intolerable inconsistency with the law of this Court and other courts, and provides an analytical framework that inadequately safeguards the supremacy of federal law in Louisiana.

III. The Decision Below Produces Inconsistency In the Administration of an Important Federal Statute for Which A Uniform Federal Rule Is Necessary.

When federal programs that "'by their nature are and must be uniform in character throughout the Nation,'" formulation of controlling federal rules are necessary to preclude disparate treatment. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979), *quoting United States v. Yazell*, 382 U.S. 341, 354 (1966).[6]

When "application of state law would frustrate specific objectives of the federal program[ ] . . . , [the Court] must fashion special rules solicitous to those federal interests." *Kimbell Foods,* 440 U.S. at 728.[7] In the case now before the Court, the personal immunity granted to a longshore worker is at risk. That federal immunity should not and cannot be dissolved based upon the state in which the immune worker happens to be employed.

For example, in *Teamsters v. Lucas Flour Co.*, the Court held that § 301 of the Labor Management Relations Act of 1947 (at 29 U.S.C. § 185), mandated a uniform national rule to ensure uniform interpretation of collective-bargaining agreements, which by their nature, could be applied differently in each state. 369 U.S. 95, 103-104 (1962). "[W]e cannot but conclude that in enacting section 301

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[6] *See also Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); *Illinois v. Milwaukee*, 406 U.S. 91, 105 n.6 (1972).

[7] *See also RFC v. Beaver County*, 328 U.S. 204 (1946); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 595-97 (1973); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465-66 (1975); *Miree v. DeKalb County*, 433 U.S. 25, 31-32 (1977); *Robertson v. Wegmann*, 436 U.S. 584, 590-93 (1978); *De Sylva v. Ballentine*, 351 U.S. 570, 581 (1956).

Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Id.* at 104. Also, in *Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, the plaintiff could not elect to proceed under state law when the relief sought under state law was not available under the federal National Labor Relations Act ("NLRA"). To allow otherwise would frustrate the congressional intent in enacting the constraints of the NLRA. 427 U.S. 132, 148 (1976).

Similarly, in *Western Union Telegraph Co. v. Boegli*, 251 U.S. 315 (1920), this Court considered whether a state could prosecute a telegraph company under state laws (assessing fines for delivery transgressions), after Congress legislatively brought telegraph companies within the control of the Act to Regulate Commerce and the Interstate Commerce Commission. This Court held that the state court erred in imposing a penalty on a telegraph company under the state law, because the statute so clearly established Congress' purpose to subject telegraph companies to a "uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate." *Id.* at 316. Likewise, Congress' purpose in amending the LHWCA to add section 933(i) was to establish a uniform national rule as to the immunity of LHWCA workers to tort suits brought by their injured co-workers. The section would be meaningless, as it is in Louisiana, if states could disregard it.

The decision below has resulted in the application of a federal statute – the LHWCA – that differs depending on whether a person covered by the statute is sued in Louisiana – or in Alabama, Texas or Pennsylvania. It is important for

this court to rectify the confusion, especially because of the volume of maritime injuries that occur in the coastal state of Louisiana. At this time, thousands of pre-1976 exposure asbestos-injury cases are pending in Louisiana state courts against one or more of the shipyard co-workers defendants sued in the cases subject to this Petition. And, given the long latency period of asbestosis, the decision below will affect countless other cases that have yet to be filed. It is therefore essential that this Court definitively resolve the question whether the LHWCA's immunity provision preempts these tort suits.

CONCLUSION

The decision below conflicts with decisions of other state supreme courts and federal courts of appeals. It is further inconsistent with several decisions of this Court, which address the LHWCA specifically and the doctrine of preemption generally. The federal immunity right that was displaced by the Louisiana Fifth Circuit Court of Appeal, applying controlling precedent of the Louisiana Supreme Court, is an important federal right integral to the LHWCA, which cannot be overridden by state law and for which uniform application among the states is essential. For the

foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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